

ORIGINAL

JUL 1 1996

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the matter of

JAMES A. KAY, JR.

Licensee of one hundred fifty-  
two Part 90 licenses in the  
Los Angeles, California area.

To: The Commission

WT Docket No. 94-147

DOCKET FILE COPY ORIGINAL

CONSOLIDATED BRIEF

AND

EXCEPTIONS OF JAMES A. KAY, JR.

Barry A. Friedman  
Scott A. Fenske  
Thompson Hine & Flory P.L.L.  
1920 N Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 331-8800

Counsel for James A. Kay, Jr.

Bruce Aitken  
Martin J. Lewin  
Aitken, Irvin, Lewis  
Berlin, Vrooman & Cohn  
1709 N Street, N.W.  
Washington, D.C. 20036  
(202) 331-8045

Counsel for James A. Kay, Jr.

July 1, 1996

0+14

**SUMMARY PAGE**

In this Consolidated Brief and Exceptions of James A. Kay, Jr., Kay notes four fundamental errors in the Summary Decision of Administrative Law Judge Richard L. Sippel, FCC 96D-02, released May 31, 1996.

First, the Presiding Judge erroneously considered the unsworn testimony from the prosecutorial staff of the Commission, testimony which was contradicted by Kay's own sworn declarations. By considering these unsworn statements, the Presiding Judge violated Section 1.251 of the Commission's Rules, and every rule of procedural due process.

Second, as a result of the Commission's 1992 deregulatory order, Kay was not required to maintain, much less produce, the information requested by the Wireless Telecommunications Bureau. The Presiding Judge's conclusion to the contrary is reversible error.

Third, Kay did not willfully fail to produce information in response to the Bureau's discovery requests or the Bureau's request pursuant to § 308(b) of the Communications Act. The Presiding Judge lacked evidence from the Bureau to make this conclusion. Therefore, the Summary Decision was improperly granted.

Finally, the Presiding Judge erroneously set a forfeiture, despite the fact that the Bureau never requested such relief in its moving papers. In awarding a forfeiture, the Presiding Judge grossly exceeded the current Commission guidelines.

As a result of these and other reversible errors noted herein, there was absolutely no basis for a summary decision. The Commission's only course of action is to now reverse the Summary Decision, remand the matter for a full evidentiary hearing, and assign an unbiased Administrative Law Judge to serve as the Judge for the hearing.

## TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT . . . . .	1
II.	STATEMENT OF THE CASE . . . . .	2
	A. The Licensee . . . . .	2
	B. The Proceeding . . . . .	2
	C. The Judge's Conclusions . . . . .	4
III.	QUESTIONS PRESENTED . . . . .	4
IV.	ARGUMENT . . . . .	5
	A. THERE WAS NO BASIS UPON WHICH TO GRANT THE S.D. . . . .	5
	B. KAY HAS COMPLIED WITH ALL COMMISSION RECORDKEEPING REQUIREMENTS . . . . .	10
	C. KAY FULLY RESPONDED TO BUREAU INTERROGATORY NO. 4 . . . . .	14
	D. KAY HAS NOT VIOLATED SECTION 308(b) OF THE COMMUNICATIONS ACT . . . . .	20
	E. THERE SHOULD BE NO FORFEITURE . . . . .	24
V.	CONCLUSION . . . . .	25

## TABLE OF AUTHORITIES

Page

<u>Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems</u> (PR Docket No. 92-79), 71 RR 2d 166 . . . . .	10, 12, 13
<u>Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information</u> (PR Docket No. 92-78), 71 RR 2d 273 (1992) . . . .	11
<u>Big Country Radio, Inc.</u> , 32 RR 2d 1119 (1975) . . . . .	8, 9
<u>California Public Broadcasting Forum v. FCC</u> , 752 F.2d 670 (D.C. Cir. 1985) . . . . .	7
<u>Carol Music</u> , 37 FCC 379 (1964) . . . . .	21
<u>Commission's Forfeiture Policy Statement</u> , 10 FCC Rcd. 2945 (1995) . . . . .	25
<u>Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission</u> , FCC 96-109, released March 25, 1996 . . . . .	2
<u>GAF Broadcasting Co.</u> , 55 RR 2d 827 (Rev. Bd. 1984) . . . . .	9
<u>Innovative Women's Media Assoc. v. FCC</u> , 16 F.3d 1287 (D.C. Cir. 1994) . . . . .	15
<u>Midwest St. Louis, Inc.</u> , 48 RR 2d 95 (1980) . . . . .	6, 15
<u>Summary Decision Procedure</u> , 24 RR 2d 1715 (1972) . . . . .	6
<u>Telephone and Data Systems, Inc.</u> , 10 FCC Rcd. 10518 (1995) . . . . .	23
<u>Warren L. Percival</u> , 8 FCC 2d 333 (1967) . . . . .	21
<u>Weyburn Broadcasting Ltd. Partnership v. FCC</u> , 984 F.2d 1220 (D.C. Cir. 1993) . . . . .	7, 20

**CONSOLIDATED BRIEF AND  
EXCEPTIONS OF JAMES A. KAY, JR.**

**I. PRELIMINARY STATEMENT**

1. James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby submits his Consolidated Brief and Exceptions to the Summary Decision of Administrative Law Judge Richard L. Sippel ("Judge"), FCC 96D-02, released May 31, 1996, ("S.D.") in the above-referenced matter.

2. Kay will establish in this Brief and Exceptions that the fact-finding, conclusions and legal analysis of the Judge are fatally flawed, that the S.D. must be reconsidered and reversed and this matter set for evidentiary hearing.

3. The S.D. contains numerous reversible errors. For example, the Judge relied on so-called "representations" made by the staff of the Wireless Telecommunications Bureau (the "Bureau") in issuing the S.D.. No representations were made under oath and the "witnesses" were not subject to cross-examination. The Bureau did not meet its burden on summary decision and the Judge incorrectly ruled that Kay willfully failed to respond to the Bureau's request for information issued pursuant to Section 308(b) of the Communications Act of 1934, as amended (the "Act").

4. Based on these and other errors, the Commission is requested to reverse the S.D. and remand the matter back to an Administrative Law Judge, other than the Judge, with instructions to conduct a full hearing on the merits of the Bureau's case.

## **II. STATEMENT OF THE CASE**

### **A. The Licensee**

5. Kay, a licensee of approximately one hundred fifty-two specialized mobile radio licenses, conducts his radio business in the Los Angeles metropolitan area. Kay is a small businessman operating his SMR business in the face of large corporate competitors.

### **B. The Proceeding**

6. On December 13, 1994, the Commission issued an Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (the "HDO") against Kay. Among other things, the Commission ordered Kay to show cause why his licenses should not be revoked or cancelled and why he should not be ordered to cease and desist from certain alleged violations of Commission Rules and the Act.

7. Prior to issuing the HDO, the Bureau, in a letter dated, January 31, 1994, issued pursuant to Section 308(b) of the Act (the "308(b) Request"), requested, among other things, a copy of Kay's customer list and billing records.

8. In response to the 308(b) Request, Kay's attorneys twice sought that any documents submitted by Kay in response to the 308(b) Request remain confidential, as disclosure of this highly confidential information would have been fatal to Kay's business.<sup>1</sup> The Bureau denied both requests.

---

<sup>1</sup> Confidentiality of business documents is a matter of significance to Commission licensees. This issue is the subject of a Commission rulemaking in Examination of Current Policy

9. With no other option available to him, Kay challenged the right and propriety of the Bureau's broad ranging inquiry into his confidential business affairs by not producing the requested information.

10. On December 4, 1995, the Bureau filed a Motion for Summary Decision (the "Motion"). Despite the requirements of Section 1.251(a)(1), the Bureau did not submit an affidavit or other sworn statement in support of the Motion.

11. The Motion is premised on Kay's alleged failure to produce certain historical loading information--that is, the number of end user mobile units attributable to a particular channel--pursuant to the 308(b) Request and certain discovery requests made by the Bureau.<sup>2</sup>

12. In response to Interrogatory No. 4 of the Bureau's First Set of Interrogatories and other discovery propounded by the Bureau, Kay, after again requesting and finally receiving adequate assurance of confidentiality in the form of a protective order, produced every relevant business record in his possession (over 36,000 documents) at his sole cost and expense.

13. Despite Kay's responses, the Bureau deemed Kay's responses inadequate and filed the Motion pursuant to Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules.

---

Concerning the Treatment of Confidential Information Submitted to the Commission, FCC 96-109, released March 25, 1996.

<sup>2</sup> See Bureau's First Request for Production of Documents, First Set of Interrogatories, and Requests for Admissions of Fact and Genuineness of Documents to Kay, all of which were dated February 17, 1995.



14. On January 11, 1996, Kay filed an Opposition to the Motion, which included among other items, a sworn Declaration from Kay.

15. Pursuant to an Order, FCC 96M-7, released January 30, 1996, the Judge directed the parties to appear on January 31, 1996 to "explain the extent to which a failure of the production of documents and information related to Kay's stations, and particularly the failure to produce information with respect to loading and users, would effect [sic] the ability to litigate the substantive issues set to be tried . . ." (the "Prehearing Conference").

**C. The Judge's Conclusions**

16. On May 31, 1996, the Judge released the S.D.. Acting contrary to law and evidence, the Judge failed to consider the sworn testimony submitted by Kay, erroneously considered and relied upon the unsworn statements from the Bureau prosecutorial staff at the Prehearing Conference, and incorrectly concluded that Kay was obligated to produce the information requested by the Bureau and that Kay deliberately failed to respond to the 308(b) Request. The Judge erroneously granted the Motion.

**III. QUESTIONS PRESENTED**

A. Whether the Judge committed reversible error in considering and relying upon the unsworn statements from the Bureau prosecutorial staff made at the Prehearing Conference?

B. Whether Kay was obligated under Commission Rules to maintain the documents requested by the Bureau?

C. Whether the Judge erroneously concluded that there were no material facts to be determined at a hearing on the merits of the HDO?

D. Whether the Judge erroneously concluded that Kay willfully violated Section 308(b) of the Act as of January 31, 1994?

E. Whether the Judge wrongfully levied a forfeiture against Kay?

#### **IV. ARGUMENT**

##### **A. THERE WAS NO BASIS UPON WHICH TO GRANT THE S.D.**

17. In revoking Kay's licenses and taking away the business he has built over two decades, the Judge did not even permit Kay to present any evidence in support of his case. Instead, the Judge has revoked the licenses in a summary manner. The evidence provided by the Bureau consisted of unsworn testimony offered by the prosecutorial staff of the Commission at a Prehearing Conference in which Kay was neither requested, required or permitted to proffer expert testimony on his behalf and in the face of sworn affidavits from Kay which contradict the staff's unsworn testimony. The use of such an extraordinary procedure to revoke licenses violates every rule of procedural due process and raises the question of why elemental fairness was not accorded to Kay.<sup>3</sup>

---

<sup>3</sup> Despite these glaring deficiencies, the Judge relied on the "representations of Bureau staff . . . made in oral argument" (S.D. 10) in making the S.D., apparently in improper reliance on Section 1.251(a)(1) which provides that the movant (not the presiding officer) may rely on "other materials subject to

18. Section 1.251(d) of the Commission's Rules provides that "[t]he presiding officer, giving appropriate weight to the nature of the proceeding, the issue or issues, the proof, and to the need for cross-examination, may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision." Section 1.251(b) of the Commission's Rules provides that the party opposing a request for summary decision must show "by affidavit or by other materials subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing . . . ." The presiding officer is required to view the claims presented critically, apply stringent standards, and "insure due process." Midwest St. Louis, Inc., 48 RR 2d 95, 104 (1980). See Also Summary Decision Procedure, 24 RR 2d 1715 (1972).

19. The Bureau's case falls wide of this mark. Most importantly, there is no dispute that the Bureau failed to offer any affidavit whatsoever. While recognizing this, the Judge summarily accorded the unsworn submissions of the Bureau the

---

consideration by the presiding officer . . . ." However, the Judge fails to cite any Rule which extends the meaning of the phrase "other materials" to the extent of soliciting unsworn testimony, especially the testimony of the prosecutorial staff of the Commission. Kay submits that this rule is not applicable to the evidence the Judge must consider in reaching his decision. As discussed infra, Section 1.251(d) is the proper rule. Unsworn testimony is not mentioned therein.

equivalency of an affidavit by virtue of it having come from the Bureau. (S.D. 10) For summary decision purposes, or any other adjudicatory purposes, such deference is improper.

20. On the contrary, Kay has submitted sworn affidavits meeting his Section 1.251(b) obligation. Immediate reversal is warranted where summary decision is granted against a party that has met its burden of presenting affidavits and establishing material issues of fact. See California Public Broadcasting Forum v. FCC, 752 F.2d 670, 676-677 (D.C. Cir. 1985). As the Court of Appeals has previously told the Commission, where substantial and material issues of fact exist, as here, summary decision is out of bounds. Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220, 1229-1230 (D.C. Cir. 1993).

21. As previously indicated, the Motion contains no affidavits in its favor. In response to the pleadings, the Judge ordered the Prehearing Conference during which he unilaterally decided to "educate" himself as to the operations of the specialized mobile radio industry and called upon members of the Bureau prosecutorial staff present in the hearing room to answer questions he had.<sup>4</sup> This "testimony" violated the elemental rules of due process since it was not sworn, there was no "voir dire" to establish that the Commission prosecutorial staff could offer opinion evidence, and Kay was not granted the right of cross-examination and the prosecution of his own case.

---

<sup>4</sup> Objections by Kay's counsel to the procedures were cut-off by the Judge who stated that counsel would have a chance to make statements later in the proceeding. (Tr. 145).

22. The Judge willingly accepted and accorded the utmost credibility to the unsworn testimony of the Bureau's prosecutorial staff.<sup>5</sup> This is inappropriate and improper. Kay is unable to locate any Commission precedent for unsworn statements forming the predicate for a summary decision, especially a summary decision resulting in the revocation of a long-term licensee's authorizations. In fact, the Review Board has held (Big Country Radio, Inc., 32 RR 2d 1119, 1121 (1975)):

In making this [summary decision determination], the Presiding Judge should carefully scrutinize the moving party's papers, while the opposing party's papers, if any, should be treated with considerable indulgence.

A review of the S.D. reveals that the Judge stood this directive on its head, treating the Bureau's unsworn allegations and

---

<sup>5</sup> The Judge's cavalier handling of the evidence has permitted the record to contain a series of factual inaccuracies. In reliance on the Bureau staff's unsworn statements, the Judge concluded that "[t]he Bureau has shown how the loading data facilitate [sic] proof of fictitious licenses." (S.D. 11) Not only is this statement inaccurate, but the Judge's stated rationale for such a conclusion is legally and factually incorrect. First, conventional stations are not automatically shared stations. Footnote 12 on page 11 of the S.D., itself, contradicts this statement. Second, all fully loaded conventional stations are not necessarily capable of being trunked since one licensee must have exclusivity or concurrence from all co-channel licensees. Third, the "testimony" concerning paper loading and subsequent cancellation of licenses is incorrect. When a conventional SMR station is converted to a trunked station, the conventional SMR user licenses are not canceled. Instead, the conventional SMR user licenses are merely added to the loading of the trunked SMR license. Finally, contrary to the Judge's misinterpretation of the transcript of the Prehearing Conference, Kay's billing system can accurately provide loading information on the day he makes the inquiry and can provide an accurate view for about the previous year. Kay's database becomes inaccurate only as changes in a customer's frequency or system or number of mobile units are made to individual customer's accounts.

"tutorial" for the Judge with utmost indulgence and Kay's sworn declarations with total disregard.

23. It is uncontested that the Commission has long established that summary decision is an "extraordinary procedure" that may "only be granted" when there is no genuine issue of any material fact. GAF Broadcasting Co., 55 RR 2d 827, 832 (Rev. Bd. 1984). In fact, the Judges have been instructed that they possess the discretion to proceed with a hearing even if they can find "that the facts are undisputed." Id.

24. In this particular case, Kay has established by his sworn evidence that there are material issues of fact as to his compliance with Section 308(b) and Interrogatory No. 4. As for the Bureau, it offered absolutely no sworn evidence in its favor and the Judge, sua sponte, elicited unsworn testimony from the prosecutors. Despite this, the Judge gave all the weight to the unsworn testimony and no weight to Kay's sworn affidavits.<sup>6</sup> This is as arbitrary and capricious a proceeding and result as can be imagined. It must be reversed.

---

<sup>6</sup> In rendering the S.D., the Judge concludes that Kay has "conceded" that the Bureau has not been given loading data it requested. (S.D. 10). This is incorrect. Kay has never conceded such a point and has claimed to the contrary. See, e.g., Kay's Opposition to the Bureau's Motion at pg. 3, submitted on January 11, 1996. More importantly, there is no record evidence for this point in the S.D. The Review Board has taught that where a Judge fails to state in his decision the substantiation for a conclusion, the issuance of S.D. on that point is inappropriate. Big County Radio, Inc., supra at 1121.

**B. KAY HAS COMPLIED WITH ALL COMMISSION RECORDKEEPING REQUIREMENTS**

25. What stands at the heart of the Bureau's allegations of fault against Kay, and adopted without question by the Judge, is that Kay has been unable to produce documents in an unspecified form of the Bureau's choosing such that it can reach conclusions as to Kay and develop its case-in-chief.<sup>7</sup> In this regard, the Judge has reviewed and unilaterally revised Part 90 of the Commission's Rules and, in so doing, tossed out the Commission's deregulatory efforts. The result is that Kay is being held to a standard of recordkeeping that the Commission has long abandoned. While deregulation may have made enforcement a difficult job, it is not the Judge's role to revise the rules that Kay and others were led to believe were applicable.

26. In 1992, the Commission determined, after notice and comment rulemaking, to alter the Part 90 licensee obligations. Thus, in Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems (PR Docket No. 92-79), 71 RR 2d 166 (1992), the Commission announced a new system. Instead of requiring that licensees of trunked SMR systems file mobile loading data annually and at renewal, Part 90 licensees were relieved of filing at intervals and advised that they would only have to file

---

<sup>7</sup> Having already brought the charges against Kay and having the twin burdens of going forward and proving its case, Kay sees no reason why the onus is on him to prepare the Bureau's case.

such information "when applying for authorizations for which loading is a prerequisite." Id. at 170.

27. As for records to be kept, Part 90 licensees were freed from specific data collection requirements. Part 90 licensees were permitted to use their "ordinary business records" when keeping their records as to their users. These ordinary business records are the standard business records that the licensee would keep for its regular business purposes.

28. Likewise, in Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information (PR Docket No. 92-78), 71 RR 2d 273 (1992), the Commission deregulated Part 90 procedures dealing with the requirement that licensees of shared systems that do not individually license their end users to maintain and periodically furnish detailed information as to their customers. This requirement was deemed to be an "unnecessary regulatory burden" on the public. Id. at 275. The need for any end user list was eliminated as it "serves no useful administrative purpose for the Commission in processing and licensing private land mobile radio systems." Id. at 274.

29. Despite these clear and powerful words, the Judge has ordered Kay to prepare and produce a list of end users ruling that the actions of the Commission are of no import and "[t]he deregulatory rulemaking cannot operate to deny discovery to the Bureau to which it is entitled under an entirely different set of rules." Order, FCC 95M-203, released October 31, 1995.



30. The clash between the rulemaking changes adopted by the Commission and the demands of the Bureau and the Judge to resurrect the discredited regulatory scheme have a direct impact on Kay. On the one hand, he was told to maintain ordinary business records of loading and that they will be needed only if he seeks to add to his system. On the other hand, he is being ordered to produce records that are no longer required to satisfy the Bureau and, being unable to provide records meeting eliminated requirements, is finding his licenses at jeopardy. The message being sent to the Part 90 community is that by following Commission deregulatory mandates you conduct your business at your own risk. This result was not intended by the Commission and the Commission must right the wrong.

31. The Judge's treatment of the records issue also ignores the fact that the Bureau never properly requested in its discovery any loading records that Kay might possess (see discussion, infra). Even the Bureau staff was forced to admit that it was not certain as to how licensees are supposed to maintain business records in the absence of guidance in the rules, regulations, public notices or otherwise (Tr. 149-50). In the absence of such guidance, Kay is still faulted for his attempts to operate on a deregulated basis. If Part 90 is not deregulated, let the Commission return to the world that appeals to the Judge.<sup>x</sup>

---

<sup>x</sup> The Judge bases his conclusions (S.D. 6, n.5) in this matter on the statement in SMR rulemaking (PR Docket No. 92-79) dealing with ordinary business records. Again, the issue of what

32. In relying on PR Docket No. 92-79 for the proposition that a "loading report" could be calculated on business records kept in the ordinary course of a licensee's business (S.D. 16), the Judge overlooked a key element of the decision. As discussed supra, effective October 1992, loading records are no longer a regulatory tool that could be used to revoke a licensee's operating authority. It is now used only when a licensee seeks to expand an existing system or construct a new system within 40 miles of an existing system and when applying for its first renewal in a waiting list area for a system licensed before June 1, 1993. No other purposes were recognized by the Commission. If the Commission intended for this to be some form of gatekeeping requirement, it should have specified so.

33. As for the maintenance of records, the Judge also failed to consider that the Report and Order in PR Docket No. 92-79 (§ 18) only requires a Part 90 licensee to maintain historical records for a period of six (6) months. Here, of course, the Bureau was asking Kay to provide records for four (4) years before, well beyond any period he was obligated to maintain records. Even if the six-month requirement is not considered, Section 90.447 limits record retention of one (1) year, again much less than the records the Bureau sought."

---

is an ordinary business record is one that has to be left to the licensee in the absence of specific guidance from the Commission.

<sup>9</sup> In considering the Commission's Rules, the Judge makes reference to Section 90.631(b) (S.D. 11, n. 11). In so doing, the Judge fails to recognize that the rule refers to trunked SMR stations originally assigned in the SMR pool channels. Kay,

34. The Commission has given Kay and other Part 90 licensees authority not to keep loading and end user information. As the Commission made clear, this information no longer serves a regulatory purpose, and ordinary business records are needed only for expansion purposes. Loading and end user information is no longer a law enforcement tool. The Judge and the Bureau clearly desire to turn the clock back to another time; the Commission must inform them that it is too late.

**C. KAY FULLY RESPONDED TO BUREAU INTERROGATORY NO. 4**

35. In revoking all of Kay's licenses, the Judge seizes on Kay's response to the request for information made upon him by the Bureau. One of these is Interrogatory No. 4,<sup>10</sup> propounded by the Bureau in its First Set of Interrogatories submitted on February 17, 1995, subject to a motion to compel by the Bureau, and an ultimate order from the Judge. See Order, FCC 95M-203, released October 31, 1995. Kay responded to the Judge's Order, but the Judge erroneously determined in the S.D. that the response amounted to a willful failure. Consequently, the Judge

---

however, does not hold any of these stations. Consequently, the reference by the Judge is patently in error.

<sup>10</sup> Interrogatory No. 4 states as follows:

With respect to each of the call signs listed in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994), identify each and every "end-user" (i.e., customer) and the number of mobile units of each such "end-user" (i.e., customer) since January 1, 1991.

improperly revoked Kay's licenses, a result that must be reversed.

36. There is no doubt that when directed by the Judge, Kay turned over to the Bureau the information that he had in his possession which he determined was responsive to Interrogatory No. 4. The Bureau has never asserted that Kay has withheld any information, has destroyed information that was requested, or is in any manner not providing information in his possession. What is at issue is that Kay simply cannot provide information in some different and unknown format unless the Bureau specifies what format it desires - which it has not done. At no time has the Commission ever sanctioned a party that turned over the information it possessed. The penalty levied here greatly exceeds the Commission's authority in the context of discovery. In that Kay was responding to a request, and there were other measures to protect the ability of the Bureau to make its own case, revocation was both arbitrary and capricious. See Innovative Women's Media Assoc. v. FCC, 16 F.3d 1287, 1289-1290 (D.C. Cir. 1994).

37. Summary decision is available for use by a Judge if and when there are no genuine issues of material fact. Midwest St. Louis, supra. In this instance, there was a clear factual dispute as to the response to the interrogatory. The Bureau failed to provide any sworn evidence that Kay had willfully failed to provide the information it requested. Rather, the Judge was relying entirely on unsworn claims of the Bureau and a

sworn response from Kay that he had delivered all responsive documents in his possession. Summary decision was inappropriate.

38. Consideration of the response to Interrogatory No. 4 requires an examination of Kay's recordkeeping and billing practices. As detailed supra, the Commission has no rules or regulations dealing with how Part 90 licensee business records must be kept. Kay's practice is not to maintain, per se, historical loading information beyond the one year required by Section 90.447 of the Commission's Rules. As set forth in Kay's response to Interrogatory No. 4, Kay only maintains his current records. Kay keeps his records in two forms. He has individual paper files, arranged alphabetically by customer name with copies of bills, a repeater contract (assuming one has been executed), and miscellaneous notes. These files were copied and delivered to the Bureau. Second, Kay has developed a database on his computer system. This database is indexed by customer name and in alphabetical order and lists customers by name, address, phone numbers, contact name, billing period, number of control stations, number of mobile stations, frequency/site or system (where appropriate) and various account information. The database was also supplied to the Bureau.

39. Despite receiving every piece of customer information available to Kay, the Bureau has continued to insist on historical loading records. Historical loading records, per se, do not exist and rather than document production, the Bureau is asking Kay to manufacture information that he would be unable to

swear was accurate and correct.<sup>11</sup> This is not what discovery was meant to require.

40. Kay has not been required since 1992 to maintain specific loading or end user information. Kay has maintained his records in the fashion of a businessman seeking most importantly billing records and accounts payable documents. As such, Kay had no need to maintain information for periods where the customers were no longer current or he was not servicing them.

41. As a prudent businessman, with limited file and computer capacity, Kay regularly purged storage information to make space for current records. All information regarding closed accounts was deleted approximately every six (6) months. See Pg. 3 of the Declaration of James A. Kay, Jr., attached as Exhibit C to his Opposition to the Bureau's Motion for S.D. and Order Revoking Licenses dated January 11, 1996 ("Declaration").

42. As the Judge has noted (S.D. 12), Kay's offices were in close proximity to the epicenter of the Northridge Earthquake of January 17, 1994. His offices sustained significant damage, including to his computer system. Declaration Pg. 3. Due to a significant loss of data from the damage to the old system, only accounts which had not discontinued repeater service prior to September 1993 were manually reentered on the system. Id. With

---

<sup>11</sup> However, were the Bureau willing to expend effort, it could, from the records provided, determine the business trends and station utilization (i.e. loading) for approximately one year. Where changes do occur in customer information, the reliability of the database decreases.

the new system having greater capacity, Kay has maintained information on all accounts from September 1993 to date.

43. Considering this information, the Judge erroneously concluded that Kay "set up his business records in a manner that would not record loading data that was sufficient to show compliance" (S.D. 15). Kay submits that the only evidence that the Judge has was that Kay had established, in early 1989, an information collection and retention system and the Commission had set no guidelines as to how that system was to be maintained. Based on that fact, how could Kay be required to undertake recordkeeping in some fashion acceptable to the Bureau in the absence of specific direction?

44. In Interrogatory No. 4, the Bureau requested that Kay list the users of each of his stations by call sign and the number of mobile units of each user. Kay has no records, and is not required to keep records, that list his users by call sign. Kay's business records do not even contain his own call signs since no rule requires that Kay's business records reference Commission call signs. Kay's business records list customers and use of stations by sites and frequencies or sites and systems, rather than by call signs for a simple reason: radio technicians program radios and test repeaters and radios by frequency or system, not by call sign. Declaration Pg. 3.

45. The information requested by the Bureau in Interrogatory No. 4, much like the information requested in the 308(b) Request, is inadequate to the task the Bureau stated as

its purpose and is, in fact, an attempt to harass and burden Kay through overbroad discovery.<sup>12</sup> There is no way that the information the Bureau has sought could make a case that Kay either met or did not meet the construction and loading requirements, since the request did not ask for the time period in which each user operated on a particular station. Without such information, the Bureau would never know when stations went into operation, daily changes in loading, or even if and when stations licenses were cancelled owing to the absence of use.<sup>13</sup> It is clear that the Bureau, despite the HDO, had not prepared a case against Kay and was using this fishing expedition to secure information to make its case after the fact.

46. The Bureau had no firm grasp on violations of any Commission rules by Kay. It was using the discovery process to secure information that it could use for the case it was unable to make.<sup>14</sup> Kay, as a reasonable businessman, kept his required

---

<sup>12</sup> Interestingly, as the Commission is aware, Kay has no right to secure any discovery materials from the Bureau even though Kay's own business stands in jeopardy.

<sup>13</sup> The Bureau has also failed to consider co-channel loading on frequencies Kay shares with others. A review of Kay's stations, without taking into consideration co-channel stations, would not enable the Bureau to determine if the frequency on which Kay's station was assigned was fully loaded and, as a result, whether Kay was eligible for additional stations or frequencies. Again, the Bureau was doing nothing more than fishing around and harassing Kay.

<sup>14</sup> See also September 15, 1994 Memorandum from W. Riley Hollingsworth to Ralph A. Haller ("We have confidence that discovery will reveal that not all of Kay's stations are constructed, and that he exaggerates his loading to avoid the consequences of our channel sharing and channel recovery provisions.")



business records in the manner he judged appropriate for his business. When the full and complete set of records was turned over to the Bureau, the Bureau found that they failed to meet the Bureau's perception of what they expected the records to contain. With no case in hand, the Bureau then sought to disqualify Kay rather than give him a chance to prove himself in hearing.

47. Summary decision is an "extraordinary" remedy and one that is to be sparingly used, if at all. Weyburn Broadcasting teaches that summary decision is to be used only where a full, complete, and undisputed evidentiary record is established to warrant the relief to be accorded. Here, there are genuine issues as to the information provided, the information Kay is required to maintain, the value of the information sought, and whether the Bureau is in any manner disadvantaged by what it received. A full hearing is required to resolve these issues. The summary decision was arbitrary and capricious, and must be reversed.

**D. KAY HAS NOT VIOLATED SECTION 308(b) OF THE  
COMMUNICATIONS ACT**

48. The Judge's other ground for disqualification of Kay relates to the 308(b) Request and the claim by the Bureau that Kay willfully violated this provision of the Act. The revocation on 308(b) grounds is premised on Kay's alleged failure to produce information dealing with his customers. Kay did not withhold such information; rather, he exercised his due process rights to ensure that confidential customer information would not be delivered over to his competitors who were being kept informed by